UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NCTA – THE INTERNET & TELEVISION ASSOCIATION, Plaintiff, -against- AARON FREY, in his official capacity as Attorney General of the State of Maine, and TOWN OF FREEPORT, MAINE; TOWN OF NORTH YARMOUTH, MAINE, Defendants.	Case No.

MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiff NCTA – The Internet & Television Association ("NCTA") seeks immediate injunctive relief on behalf of its members to prevent enforcement of provisions of the recently enacted S.P. 426 – L.D. 1371, "Act To Ensure Nondiscriminatory Treatment of Public, Educational and Governmental Access Channels by Cable System Operators," 129th Leg., Pub. L. Ch. 245 (Me. 2019) (the "Maine Act"). Provisions of the Maine Act are preempted by Title VI of the Communications Act of 1934 (the "Federal Cable Act"), because they conflict with federal law and disrupt the regulatory framework for cable television. Provisions of the Maine Act also violate NCTA members' First Amendment rights.

In this motion, NCTA seeks to preliminarily enjoin two sets of requirements in the Maine Act—one imposing a blanket line-extension requirement that directs cable operators to "build out" their systems to a specific, statewide density level, and the other mandating an array of obligations on cable operators regarding the carriage of public, educational, or governmental use channels ("PEG channels"). These provisions are scheduled to go into effect on September 19, 2019.

Absent this Court's intervention, NCTA members—including Charter Communications, Inc. ("Charter") and Comcast Cable Communications ("Comcast")—will be forced either to comply with an unconstitutional and preempted law or face enforcement penalties. Meanwhile, NCTA members will incur significant, non-recoverable compliance costs, suffer competitive harm, lose goodwill with their customers, and be forced to carry programming (i.e., speak) in a manner not of their choosing. Because NCTA is likely to succeed on the merits, its members will suffer irreparable harm absent an injunction, and the balance of equities and the public interest support an injunction, the Court should enjoin these provisions of the Maine Act.

BACKGROUND

I. The Federal Cable Act

Congress enacted the Federal Cable Act in 1984 to establish a federal regulatory regime for cable operators, cable services, and cable systems. *See* 47 U.S.C. §§ 521-573. Congress had determined that the "overlapping authority of the [Federal Communications Commission ("FCC")] and municipalities" over cable services had resulted in an "ill[] defined . . . state of regulatory uncertainty." *All. for Cmty. Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008) (internal quotation marks omitted). Congress therefore concluded that "national standards" were necessary to "clarify the authority of Federal, State and local government[s] to regulate cable through the franchise process." H.R. Rep. No. 98-934, at 23 (1984) ("1984 House Report"). The Federal Cable Act established a "national policy concerning cable communications" intended to "promote competition," "assure that cable systems are responsive to the needs and interests of the local community," and "minimize unnecessary regulation." 47 U.S.C. §§ 521(1), (2), (6).

The Federal Cable Act requires that in order to provide cable service, a cable operator must obtain an authorization, called a "franchise," from a state or local government entity that acts as the "franchising authority" for that jurisdiction. *See id.* § 541(b)(1). But the Federal Cable Act carefully "define[d] and limit[ed] the authority that a franchising authority may exercise through the franchising process." 1984 House Report at 19. Thus, Congress prohibited franchising authorities from "regulat[ing] the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the Act, 47 U.S.C. § 544(a); provided that states and localities "may not impose requirements regarding the provision or content of cable services except as expressly provided" by the Act, *id.* § 544(f)(1); and specified that states and localities may not "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any

transmission technology," *id.* § 544(e), nor establish "requirements for video programming or other information services," *id.* § 544(b)(1). Congress further provided that any state or local law "which is inconsistent with [the Communications Act of 1934, which includes the Federal Cable Act,] shall be deemed to be preempted and superseded." *Id.* § 556(c).

Periodically, cable operators must renew their franchises. To this end, the Federal Cable Act establishes a detailed framework governing franchise renewals that is intended to "protect[] cable operators [from] unfair denials of renewal," *id.* § 521(5), and ensure that "the renewal process does not impose unreasonable requirements on the [cable] operator," 1984 House Report at 25-26; *see also* 47 U.S.C. § 546 (renewal provisions). In assessing a renewal proposal, a franchising authority must consider the operator's performance under the existing franchise; its ability to provide the services, facilities, and equipment it proposes to provide; and whether the operator's proposal is "reasonable to meet the future cable-related community needs and interests, taking into account the costs of meeting such needs and interests." *See* 47 U.S.C. § 546(c)(1). If a proposal is denied, that denial is subject to judicial review. *Id.* § 546(e); *Union CATV Inc. v. City of Sturgis*, 107 F.3d 434, 440 (6th Cir. 1997) (reviewing a denial of renewal).[1]

While a franchising authority may "establish requirements for facilities and equipment" in its requests for renewal proposals, *see* 47 U.S.C. § 544(b)(1), such requests are subject to the renewal requirements and other limitations on franchising authorities described above. Moreover, the renewal process is the only opportunity for franchising authorities to seek modifications to a cable franchise. States and franchising authorities may not unilaterally impose or enforce any requirements at all—including PEG or line-extension requirements—outside the franchising and

[1] A cable operator may also pursue renewal through the Federal Cable Act's alternative informal renewal procedure, without prejudicing its rights under the formal renewal process described above. *See* 47 U.S.C. § 546(h); *Beaver Creek Co-op. Tel. Co. v. Clackamas Cty.*, No. 07-645, 2007 WL 4480756, at *6-9 (D. Or. Dec. 17, 2007) ("judicial review is available whether the renewal decision is made pursuant to the 'informal' or the 'formal' renewal process").

renewal process. *See id.* § 544(b)(1); 1984 House Report at 94. When a franchise is awarded or renewed following the Federal Cable Act's required procedures, franchising authorities are limited to enforcing the requirements compliant with the Federal Cable Act that are "*contained in the franchise*." 47 U.S.C. § 544(b)(2) (emphases added).

Specifically with respect to PEG channels, the Federal Cable Act imposes particular limits on franchising authorities. A franchising authority may require in a franchise proposal "that channel capacity be designated for public, educational, or governmental use" and may "require rules and procedures for the use of the channel capacity," *id.* § 531(b), but only to the extent expressly provided in the Federal Cable Act's PEG provisions, *id.* § 531(a). Franchising authorities are also constrained to seeking assurances that a cable operator "will provide *adequate* [PEG] channel capacity, facilities, or financial support." *Id.* § 541(a)(4)(B) (emphasis added).[2]

II. The Maine Act

In Maine, local government entities—such as the Towns of Freeport and North Yarmouth—serve as the cable franchising authorities in their respective geographic areas. *See* Me. Rev. Stat. Ann. tit. 30-A, § 3008. Through their affiliates and subsidiaries, NCTA members provide cable service to over 281,500 customers in Maine and hold more than 300 separate franchises. *See* Falk Decl. ¶ 3; Reilly Decl. ¶ 3. Each franchise is governed by an agreement that the NCTA member negotiated directly with the local franchising authority. *See* Falk Decl. ¶ 4; Reilly Decl. ¶ 4. The Maine Act, however, purports to immediately amend each of these agreements as of September 19, 2019. *See* Maine Act (amending Me. Rev. Stat. Ann. tit. 30-A, §§ 3008, 3010). NCTA asks the Court to enjoin the line-extension and PEG provisions contained

[2] The FCC recently reiterated the statutory limits on PEG and line-extension demands by franchising authorities. *See In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, FCC 19-80 ¶¶ 21 & n.101, 47-48 & n.193 (rel. Aug. 1, 2019) ("Third Report and Order").

in Sections 1, 3, and 6 of the Maine Act, which will cause NCTA members immediate harm.

The Line-Extension Requirement. As the Federal Cable Act envisions, NCTA members consider a number of factors when determining whether to build out their networks, including population density, seasonal nature of home occupancy, local construction and permitting costs, characteristics of the technology to be used, ability to use existing facilities, market considerations, potential revenues and potential customer conversion rates, and the likelihood of a financial return on the investment. Falk Decl. ¶ 9; Reilly Decl. ¶ 8. When an NCTA member agrees—either as part of a franchise grant or renewal—to build out to lower density areas, its per-household construction costs are higher. Falk Decl. ¶ 10; Reilly Decl. ¶ 9. In some low-density areas, it is not economical to build out the network without some financial contribution from area subscribers. Falk Decl. ¶ 11; Reilly Decl. ¶ 10.

Franchises often include a "line extension" policy that specifies a minimum density (often stated in the number of homes-per-mile) to which the operator will extend its network and provide cable service without imposing a requiring contributions in aid of construction from the persons requesting service. Falk Decl. ¶ 12; Reilly Decl. ¶ 11. In Maine, NCTA members and local franchising authorities assess and negotiate line-extension policies together to determine what makes sense in each community. Falk Decl. ¶ 13; Reilly Decl. ¶ 12. Some of NCTA members' Maine franchise agreements include specific line-extension requirements of up to 43 homes-per-mile; some do not include any line-extension requirement; and others include alternative measures to extend access to lower-density areas. Falk Decl. ¶¶ 14-16; *see* Reilly Decl. ¶ 13.

Ignoring these individual agreements, and the differing community needs and costs they reflect, the Maine Act imposes a statewide mandate purporting to immediately amend all 307 Maine franchise agreements and require all future franchise agreements to "specify a minimum

density requirement of no more than 15 residences per linear strand mile of aerial cable for areas in which the cable system operator will make cable television service available to every residence." Maine Act § 1. This mandatory, statewide requirement does not allow for any consideration of the costs of meeting cable-related community needs and interests.

The PEG Provisions. About one third of the franchises NCTA members hold in Maine require PEG channels, but these franchises typically do not mandate where PEG channels are placed or how they are delivered. Falk Decl. ¶¶ 21-22; Reilly Decl. ¶¶ 18-20. Given the increasing demand for bandwidth and the limitations of customers' viewing equipment, Charter and Comcast both carry Maine PEG programming in Standard Definition ("SD") format. Falk Decl. ¶ 24; Reilly Decl. ¶ 22. Charter and Comcast also typically do not include detailed programming data for PEG channels in electronic program guides; PEG programmers typically do not provide the information needed to populate the program guides. Falk Decl. ¶¶ 27-28; Reilly Decl. ¶¶ 25-26.

In 2017, Charter began moving PEG channels in Maine to higher numbers on its channel lineups consistent with an ongoing, nationwide initiative to facilitate genre-based grouping of programming, more easily accommodate local fluctuations in number of PEG channels, create more standardized channel lineups, and better compete with satellite television and online video services, which are not required to carry PEG channels at all. *See* Falk Decl. ¶¶ 29-34.

In response, and ignoring the hundreds of existing franchise agreements, the Maine Act imposed an immediate, statewide mandate requiring NCTA members to carry PEG channels on the basic tier of service, on channels adjacent to local broadcast television stations; not to change PEG channel numbers without agreement; and—within sixty days of the Act's effective date—to restore to their original positions any PEG channels that were moved within the last two years. Maine Act § 6. The Maine Act also imposes new, technical requirements on the carriage of PEG

channels, requiring that they be retransmitted in both high-definition ("HD") and SD format. *See id.* Finally, the Act imposes specific requirements for how PEG channels must be identified in the cable operator's electronic program guide. *See id.*

STANDARD OF REVIEW

NCTA is entitled to a preliminary injunction because (1) it is likely to succeed on the merits; (2) absent an injunction, its members are likely to suffer irreparable harm; (3) the balance of relevant impositions tips in NCTA's favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004).[3] When "the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief." *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 743 (1st Cir. 1996).

ARGUMENT

I. NCTA Is Likely to Succeed on the Merits in Demonstrating That the Maine Act's Line-Extension Requirement and PEG Provisions Are Unlawful.

NCTA is likely to succeed in showing that the Maine Act's line-extension requirement and PEG provisions are preempted by the Federal Cable Act and that the Maine Act's PEG provisions also violate NCTA members' First Amendment rights.

A. The Maine Act's Line-Extension Requirement Is Preempted.

As detailed above, the Federal Cable Act delineates the respective spheres of permissible federal, state, and local regulation of cable operators, and provides that any state or local regulation that is "inconsistent with [the Federal Cable Act] shall be deemed to be preempted and

[3] NCTA has standing to seek an injunction and declaratory relief on behalf of its members. *See Playboy Enters., Inc. v. Pub. Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 33-36 (1st Cir. 1990) (applying *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977)); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 71-73 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008).

superseded." 47 U.S.C. § 556(c). The Maine Act's line-extension requirement is inconsistent with the Federal Cable Act and is therefore preempted. *See Liberty Cablevision of Puerto Rico, Inc. v. Caguas*, 417 F.3d 216, 220 (1st Cir. 2005) ("invalidat[ing] … ordinances to the extent they conflict with the Cable Act"); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 530-31 (1st Cir. 2007) (same).

The Federal Cable Act envisions that decisions about line-extension requirements will be made with local franchising authorities as part of the renewal process, reflecting what is "reasonable to meet future cable-related community needs and interests" and "taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c)(1). This "indicates that some needs and interests identified by the franchising authority may be outweighed by the cost of implementing them." *Union CATV, Inc.*, 107 F.3d at 440. Hence, "the statute does not require a cable operator to meet demands by the franchising authority that are unreasonable in view of their costs." *Id.* And in assessing costs, "the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important." *Id.* (quoting 1984 House Report at 74). The FCC has emphasized that "[b]uild-out requirements are subject to" the Federal Cable Act's "directive to assess reasonableness while taking into account . . . cost[s]." Third Report and Order ¶ 21 & n.101.

The broad majority of Maine franchising authorities have not required an NCTA member to expand lines to areas density as low as that required by the Maine Act, and some franchises are written in different metrics altogether (e.g., "subscribers per mile," or 30 homes per mile excluding homes with satellite dishes, or counting dishes as a fraction of a home). *See* Falk Decl. ¶¶ 15-17; Reilly Decl. ¶¶ 13-14. Effective September 19, 2019, however, the Maine Act imposes a statewide mandate that "*each* franchise *must*" include a provision requiring the cable operator to build out in areas where there are as few as 15 residences per-linear-strand-mile, regardless of whether this

requirement is reasonable for a community given the build-out costs, and without any consideration of technology, timing, geography, competition, or local markets, which will vary significantly from area to area. Me. Rev. Stat. Ann. tit. 30-A, § 3008(5) (emphases added); Maine Act § 1. By unilaterally imposing the same line-extension obligation on all existing and future Maine franchises, thus displacing the required assessment of local priorities and costs, the line-extension requirement irreconcilably conflicts with the Federal Cable Act.

The Maine Legislature made no factual findings that the requirements imposed by the Maine Act satisfied the exclusive bases on which the Federal Cable Act allows a franchising authority to rely in denying a renewal proposal, e.g., a finding that the costs to cable operators of the line-extension requirement were reasonable or in communities' best interests. *See* Compl. Sec. I.C; *id.* ¶ 80. Given the community-specific balancing that the Federal Cable Act prescribes, the Legislature could not possibly have satisfied its requirements. Yet, the Maine Act effectively directs franchising authorities—in square defiance of the Federal Cable Act—to deny all franchise proposals that do not comply with the Maine Act, including the line-extension requirement. The line-extension requirement is thus inconsistent with the Federal Cable Act and is preempted.

B. The Maine Act's PEG Provisions Are Preempted and Unconstitutional.

The Maine Act's PEG provisions likewise impose numerous, immediate, statewide requirements on NCTA members that directly conflict with the Federal Cable Act. The PEG provisions also violate NCTA members' First Amendment rights.

1. The Maine Act's PEG Requirements Conflict with the Federal Cable Act.

While the Federal Cable Act authorizes franchising authorities to require in a franchise proposal that cable operators set aside channel capacity for PEG use, 47 U.S.C. § 531(b), and provide assurances of "adequate" PEG service, *id.* § 541(a)(4)(B), PEG requirements remain

subject to all of the other limitations of the Federal Cable Act.[4] As the Maine Act's PEG provisions conflict with numerous, specific provisions of the Federal Cable Act and impose obligations that exceed what is necessary to ensure "adequate" PEG capacity, these provisions are preempted.

Placement of PEG Channels. The Maine Act requires that "[a] cable system operator shall carry [PEG] channels on the cable system operator's basic cable or video service offerings or tiers," and "may not separate [PEG] channels numerically from other local broadcast channels." Maine Act § 6. This requirement conflicts with the Federal Cable Act because under federal law, the only cable systems that may be required to carry PEG channels on their "basic service tier" are those that are not subject to "effective competition."[5] Yet cable systems in Maine have already been deemed subject to effective competition in many instances and in all instances are subject to a presumption of effective competition. *See In re Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574 (2015). No Maine franchising authority has sought to rebut that presumption.

Although Congress mandated channel position requirements for certain channel types, it enacted no similar requirements for PEG channels. *Compare* 47 U.S.C. § 531, *with id.* § 534(b)(6) (specifying channel positioning requirements for local commercial television stations); *see also id.* § 535(g)(5) (same for noncommercial educational television stations). Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted).

[4] Were it otherwise, franchising authorities would not be regulating consistently with all terms of the Federal Cable Act, whose generally applicable limitations do not exempt PEG channels from their coverage. *See* 47 U.S.C. § 544(a); *cf.* Third Report and Order ¶¶ 20, 42 (authorization to require PEG capacity does not remove the obligation from the generally applicable cap on cable franchise fees).

[5] *See* 47 U.S.C. §§ 543(a)(2), (b)(7); *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995) (requirements in § 543(b) apply only to systems not subject to effective competition).

Transmission Technology and Signal Quality. The Maine Act requires cable operators to "carry each [PEG] channel in both a high definition format and a standard digital format in the same manner as local broadcast channels." Maine Act § 6. By requiring that PEG channels be provided via HD technology and in the same quality and format as local broadcast channels, the Maine Act violates the Federal Cable Act's command that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of . . . any transmission technology." 47 U.S.C. § 544(e); *see also* H.R. Rep. No. 104-458, at 168 (1996) (Conf. Rep.) (noting that Sec 544(e) was intended to "prohibit[] States or franchising authorities from regulating in the areas of technical standards, consumer equipment, and transmission technologies"). Congress did not carve out PEG-related transmission-technology requirements from this ban. Indeed, the FCC has held that the Federal Cable Act prohibits a franchising authority from requiring a cable operator to transmit programming in a particular "format"[6] and from "control[ling] whether a cable operator uses" a particular format for "transmissions."[7] Yet the Maine Act does precisely what is forbidden by prescribing the technology that cable operators must use to transmit PEG channels (HD and SD), and by conditioning the grant or renewal of a franchise on a "transmission technology."

Moreover, the Federal Cable Act grants the FCC exclusive jurisdiction over cable systems' "signal quality." *See* 47 U.S.C. § 544(e). The Maine Act impermissibly attempts to regulate "signal quality" by requiring that PEG channels be transmitted in both HD and SD, and by mandating how cable operators retransmit PEG signals—in the format received, at the same signal quality as local broadcast signals, and without diminishing or down converting signal quality. Congress has made clear that the carriage of programming in HD is a "[s]ignal quality" issue. *See*

[6] *In re Implementation of Cable Act Reform Provisions of Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 7609, 7613-14 ¶¶ 12-14 (2002).
[7] *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5356-57 ¶¶ 141-142.

47 U.S.C. § 534(b)(4)(B) (including carriage of "advanced television" signals as a matter related to "[s]ignal quality"); H.R. Rep. No. 102-862, at 67 (1992) (Conf. Rep.) (explaining that "advanced television" includes "the authorization of broadcast high definition television (HDTV)"). States and localities thus exceed their powers where, as here, they attempt to dictate signal quality.[8]

Electronic Program Guides. The Maine Act requires that "[a] cable system operator, when requested, shall assist in providing the originator with access to the entity that controls the cable television service's electronic program guide so that subscribers may view, select and record [PEG] channels in the same manner as that in which they view, select and record local broadcast channels." Maine Act § 6. The Maine Act further provides that "a cable system operator shall identify [PEG] channels on the electronic program guide in the same manner as that in which local broadcast channels are identified." *Id.*

Maine's attempt to regulate electronic program guides is preempted whether such guides are classified as a "cable service" or an "information service" under the Federal Cable Act. If electronic program guides are part of "cable service"—because they enable "subscriber interaction . . . which is required for the selection or use of … video programming or other programming service," 47 U.S.C. § 522(6)—then the Maine Act's attempt to regulate such guides is preempted because the Federal Cable Act prohibits states and localities from "impos[ing] requirements regarding the provision or content of cable services," absent express authorization in the Federal Cable Act. *See id.* § 544(f)(1). The Federal Cable Act nowhere authorizes states or franchising authorities to set requirements for electronic program guides. Alternatively, if electronic program

[8] The history of Section 544(e) confirms that states and franchising authorities may not supplement the FCC's "minimum technical standards." The provision, part of the Federal Cable Act in 1984, was amended in 1992 to provide that a "franchising authority may apply to the Commission for a waiver to impose standards that are more stringent" than those "prescribed by the Commission." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 16, 106 Stat 1460, 1490. Then in 1996, Congress repealed that language to "prohibit States or franchising authorities from regulating in the areas of technical standards, consumer equipment, and transmission technologies." H.R. Conf. Rep. 104-458, at 168; *cf. City of N.Y. v. FCC*, 486 U.S. 57, 65 (1988).

guides are considered an "information service" under the Federal Cable Act—because they provide "a capability for . . . for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(24)[9]—then the Maine Act's attempt to regulate them is likewise preempted because Congress specifically prohibited franchising authorities from "establish[ing] requirements for video programming or other information services." *Id.* § 544(b)(1).

Franchising Authorities Are Limited to Requiring "Adequate" PEG "Channel Capacity, Facilities, or Financial Support." Under the Federal Cable Act, a franchising authority may require "that channel capacity [on a cable system] be designated for public, educational, or governmental use," *id.* § 531(b), but "only to the extent provided in" the Federal Cable Act, *id.* § 531(a), and pursuant to the Federal Cable Act's renewal procedures, *id.* §§ 531(b), 546. In no instance may a regulator go further than "requir[ing] adequate assurance that the cable operator will provide *adequate* public, educational, and governmental access channel capacity, facilities, or financial support" *Id.* § 541(a)(4)(B) (emphasis added). The Maine Act violates this clear limit.

As an initial matter, the Maine Act's PEG provisions are not regulations of "channel capacity," "facilities," or "financial support"—and hence they fall outside the sphere of authority granted to States and franchising authorities. *See id.* § 541(a)(4)(B). Even if they were, however, the Maine Act's PEG requirements exceed what is necessary to ensure "adequate" PEG service. The FCC has interpreted "adequate" for these purposes according to "its plain meaning" as requiring only "'satisfactory or sufficient'" PEG services. *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 As Amended by the Cable Television Consumer Protection & Competition Act of 1992*, Report and Order and Further Notice of

[9] This definition applies "[f]or the purposes of" Title 47, which includes the Federal Cable Act. 47 U.S.C. § 153; *see* Third Report and Order ¶ 74 (making clear that definition of Section 153(24)'s definition applies to Section 544(b)).

Proposed Rulemaking, 22 FCC Rcd 5101, 5152 ¶ 112 (2007); *see All. for Cmty. Media*, 529 F.3d at 785 (upholding FCC's interpretation). Here, the Maine Act's PEG requirements go far beyond any definition of "adequate" PEG services.

- First, requiring that PEG channels be provided in SD and in HD and "in a quality and format equivalent to the quality and format" of local broadcast channels, Maine Act § 6, far exceeds "adequate," "satisfactory," or "sufficient" service. Standard Definition is the regular-level transmission format that all customers, no matter their equipment, may view. Falk Decl. ¶ 25; Reilly Decl. ¶ 23. Demanding an HD channel for the same content therefore requires more than what is "adequate." Maine has simply rewritten Congress's standard for PEG transmission quality ("adequa[cy]") with its own standard ("equivalent" to local broadcast).

- Second, "adequate" PEG service does not mean channel placement on the basic tier, or at the location most desired by the franchising authority (or the state). In contrast to its treatment of television broadcast signals, Congress declined to impose PEG channel placement requirements. *See supra*, at 10.

- Third, the requirements for electronic program guides also go beyond "adequate." NCTA members already list PEG channels in their electronic program guides, and customers already have the ability to navigate to those channels via the guides. *See* Falk Decl. ¶ 27; Reilly Decl. ¶ 25. The further, guide-related mandates in the Maine Act go well past any reasonable understanding of "adequate." Indeed, the FCC has repeatedly rejected these types of mandates for PEG channels. *See In re Accessibility of User Interfaces and Video Programming Guides and Menus*, Second Report & Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 13914, 13928-29 ¶¶ 25-26 (2015); *In re Channel Lineup Requirements – Sections 76.1705 and 76.1700(a)(4)* , Report and Order, 34 FCC Rcd 2636, 2638, 2640-41 ¶¶ 5, 10 (2019).

The FCC, presented with evidence of franchising authorities' excessive PEG demands, recently reminded franchising authorities—including states and local governments—that their regulation of PEG channels cannot go beyond ensuring "adequa[cy]" and that "demands for PEG capacity requirements that are more than 'adequate' are subject to judicial challenge . . . as well as other forms of relief." Third Report and Order ¶¶ 7, 48. The Maine Act exceeds the Federal Cable Act's specific limits and is therefore preempted.[10]

[10] Moreover, as with the line-extension requirement, the Federal Cable Act does not permit franchising authorities to impose PEG requirements without regard to what is "reasonable" in light of "cable-related community needs and interests, taking into account the cost of meeting such needs and interests." *Supra*, at Sec. I.A.

2. The Maine Act's PEG Provisions Violate the First Amendment.

The Maine Act's PEG provisions also violate the First Amendment. Cable operators "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citation omitted). PEG requirements in general are constitutionally suspect.[11] But even assuming the *Federal Cable Act*'s content-based PEG requirements are constitutional, the *Maine Act*'s PEG provisions cannot stand because they impose additional content-based restrictions on cable operators' speech. Requiring cable operators to carry the government's own speech significantly burdens the First Amendment by limiting an operator's editorial discretion. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). But telling NCTA members exactly *how* they must do so—in SD and HD, on certain channel numbers and in certain programming tiers, and with particular designations in the electronic program guide—intolerably increases the First Amendment injuries. *Cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it."). If the government commanded newspapers to carry its editorials, the First Amendment harm would be grave. Yet if the government *also* required the editorials to appear above the fold, in full color, and in 14-point font, those harms would be amplified.

So it is here. Just as newspaper publishers make placement and presentation choices, cable operators exercise "a significant amount of editorial discretion" by determining the best and most

[11] *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 413-14 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (describing dramatic changes in the video marketplace that make it unlikely that PEG requirements, although upheld two decades ago, would survive scrutiny today); *cf. Manhattan Cmty. Access Corp v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019) (noting that there is an open question about the "degree to which the First Amendment *protects*" cable operators "from government legislation or regulation requiring" them to "open their property for speech by others.").

efficient way to provide programming on their cable systems for the benefit of their customers. *See City of L.A. v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (quotation marks omitted). Although cable operators may not exercise editorial control over the content of PEG programming, *see* 47 U.S.C. § 531(e), NCTA members do exercise editorial discretion in deciding how to use scarce bandwidth. Yet because the Maine Act requires cable operators to devote bandwidth to broadcast PEG channels not just in HD (which uses four times as much bandwidth as SD), but in *both* HD *and* SD, this leaves operators with less bandwidth for other programming, services, and content they would prefer to deliver, Falk Decl. ¶¶ 26, 40; Reilly Decl. ¶¶ 24, 30. The Maine Act thereby overrides cable operators' editorial discretion.

The Maine Act's PEG provisions are, on their face, content-based regulations of speech. They are also speaker-based rules, as they uniquely burden the speech rights of cable operators in order to favor speakers deemed to provide public, educational, or governmental content. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). As such, the Maine Act's PEG provisions are subject to strict scrutiny, "which requires the Government to prove that the restriction[s] further a compelling interest and [are] narrowly tailored to achieve that interest." *Id.* at 2231 (quotation marks omitted).

The proffered purpose of the PEG provisions appears to be to "ensure" so-called "nondiscriminatory treatment" of PEG channels vis-à-vis broadcast channels. *See also* Maine Act § 3 (mandating carriage of PEG channels in "same manner" as local broadcast channels); *id.* § 6 (requiring equal treatment of PEG channels and local broadcast channels in terms of signal quality and format and electronic program guides). Treating PEG channels in the same manner as other channels is not a compelling state interest—or even a substantial government interest—that justifies burdening NCTA members' editorial discretion. Even if such an interest existed, the PEG

provisions are neither narrowly tailored nor "proportional to the resulting burdens placed on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). For these reasons, the Maine Act's PEG provisions impermissibly burden NCTA members' First Amendment speech rights.

C. Because the Maine Act Purports to Amend Existing Franchises, It Conflicts with the Cable Act.

The line-extension requirement and PEG provisions are also unlawful because the Maine Act purports to impose these requirements prior to the expiration of NCTA members' franchises. The Maine Act purports to alter, mid-term, the 307 franchises that NCTA members operate in Maine—imposing most requirements as of September 19, 2019, and mandating channel repositioning within 60 days. This is contrary to the Federal Cable Act, which mandates that any new obligations under a cable franchise must be adopted during the franchise renewal process, subject to the standards and terms applicable to that process as described above. *Supra*, at 3-4. It is well settled that a "state may not, with regard to [a requirement imposed upon a cable operator], enact a statute which requires compliance prior to the expiration of the current franchise." 1984 House Report at 94. The Maine Act violates this rule.

II. Absent a Preliminary Injunction, NCTA Members Will Suffer Irreparable Harm.

Absent an injunction, NCTA members will suffer irreparable harm. *See Arcadian Health Plan, Inc. v. Korfman*, No. 1:10-CV-322-GZS, 2010 WL 5173624, at *8 (D. Me. Dec. 14, 2010) (Rep. & Rec.) ("A party may be irreparably injured in the face of the threatened enforcement of a preempted law" (quotation marks omitted)), *adopted by* 2011 WL 22974 (D. Me. Jan. 4, 2011); *accord Playboy Enters.*, 906 F.2d at 33-36; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Injunctive relief is available where, as here, a party is subjected to a Hobson's choice: "violate the [challenged] law and expose [itself] to potentially huge liability; or violate the

law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

NCTA members indeed face that lose-lose choice. Upon the legislation's effective date, NCTA members would face immediate unlawful amendments to all of their existing franchises. If NCTA members refuse to comply with the unconstitutional PEG provisions, those members could be subject to liability under Maine's Unfair Trade Practices Act ("MUTPA"). *See* Me. Rev. Stat. Ann. tit. 30-A, § 3010(7). Because the legislation purports to alter existing franchise agreements to include the PEG provisions and line-extension requirement, NCTA members could face liability from defendants the Towns of Freeport and North Yarmouth and any number of their other franchising partners—who may attempt to invoke liquidated damages provisions in the franchises, or to revoke the franchises for alleged material default. *See* Falk Decl. ¶¶ 17, 35, 46-49; Reilly Decl. ¶¶ 14, 29, 35, 37-39. NCTA members could lose franchises for cable systems they invested hundreds of millions of dollars building and maintaining, could incur the cost of defending themselves in court, and could lose goodwill from being labeled in violation of the MUTPA or in breach of their franchise agreements.

The only alternative is to comply—but if NCTA members do that, they will suffer the injury of obeying regulations that are likely preempted and unconstitutional while challenging the legislation and beginning to incur the high costs of compliance, with no prospect for recovery from the State. Among other things, these costs would entail:

- Planning massive line-extension projects across Maine, securing permits and approvals necessary, and the labor and materials needed to complete the projects;
- Upgrading lines to allow for transmitting PEG channels in both SD and HD;
- Updating the way PEG channels appear in electronic program guides;
- Administrative and opportunity costs from dedicating employee hours to notifying and renegotiating with programmers whose channels have been moved into the positions previously occupied by PEG channels, repositioning PEG channels, notifying

customers about the moves, actually moving those channels, making changes to the electronic program guide to reflect the moves, and confirming the moves were made—and then having to incur those costs *again* after the Maine Act is struck down; and

- Harms to competitive position by diverting resources to fulfill uneconomic line extensions and PEG obligations, constraining ability to compete with satellite television and online video services that are not subject to these mandates.

See Falk Decl. ¶¶ 18-19, 36-45; Reilly Decl. ¶¶ 15-16, 30-35. These costs constitute irreparable injury because they are non-compensable. Franchising authorities are immune from any claim for damages. *See* 47 U.S.C. § 555a(a); *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 599-600 (6th Cir. 2014). In addition to the decrease in customer satisfaction and competitive disadvantage that will result from the significant sums NCTA members will have to pay to comply with these state-mandated requirements, the harm NCTA members would sustain to their goodwill from being labeled in violation of the MUTPA or in violation of their franchise agreements is likewise irreparable: "[b]y its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages." *Ross-Simons of Warwick, Inc. v. Baccarat Inc.*, 102 F.3d 12, 20 (1st Cir. 1996).

III. Balance of Equities Tips in Favor of a Preliminary Injunction

The equities also weigh in favor of an injunction. In balancing the equities, the court must consider "the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues." *Id.* at 15. Here, state officials have no interest in enforcing a state law that is likely to be unconstitutional, and NCTA has a strong legitimate interest in avoiding enforcement of unconstitutional laws. *See, e.g.*, *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012); *Ligon v. City of N.Y.*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013).

IV. A Preliminary Injunction Is in the Public Interest

Similarly, when a likely unconstitutional law is at issue, an injunction is in the public interest. "Where Congress has expressly preempted the state law at issue, Congress has already determined that it is the preempting federal law that serves the public interest." *Arcadian Health Plan, Inc.*, 2010 WL 5173624, at *9; *see United States v. California*, 921 F.3d 865, 893-94 (9th Cir. 2019). Congress determined that the framework embodied in the Federal Cable Act would best serve the public interest in promoting the growth and development of cable television under appropriately cabined state and local regulation. The Maine Act undermines those goals.

The same is true in the context of likely First Amendment violations. "[T]he public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right" to free speech. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001). Here there is no immediate, countervailing public interest that necessitates allowing this unconstitutional law to go into effect during the pendency of this lawsuit.

CONCLUSION

For these reasons, the Court should grant NCTA's motion and enjoin the enforcement of the PEG and line-extension provisions of the Maine Act.

Dated: September 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, I electronically filed the foregoing document entitled Motion for Preliminary Injunction and Supporting Memorandum of Law via email to the U.S. District Court, Bangor, Maine (newcases.bangor@med.uscourts.gov), and sent a copy of the foregoing document to the State Attorney General's Office by email (Christopher.C.Taub@maine.gov) and U.S. Mail at the following address:

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DATED: September 12, 2019

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